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In the Supreme Court of the United States

OCTOBER TERM, 1977

J.P. STEVENS & CO., ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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INDEX

Page

Opinions below 1

Jurisdiction 2

Questions presented 2

Statute involved 2

Statement 3

A. The underlying decrees and the first contempt adjudication 3

B. The second contempt proceeding 5

Argument 9

Conclusion 16

CITATIONS

Cases:

Black Hawk Corp. (Stevens VI), The, 177 NLRB 944, enforcement granted in part and denied in part, 431 F. 2d 900 3

Black Hawk Corp. (Stevens X), The, 183 NLRB 267 3

Cline v. *Frink Dairy Co.*, 274 U.S. 445 13

Connally v. *General Construction Co.*, 269 U.S. 385 12

International Business Machines Corp. v. *United States*, 493 F. 2d 112, certiorari denied, 416 U.S. 995 15

J.P. Stevens v. *National Labor Relations Board (Stevens I)*, 380 F. 2d 292, certiorari denied, 389 U.S. 1005 3

Page

Cases—(Continued):

J.P. Stevens (Dublin-Nathaniel Plants) (Stevens V), 171 NLRB 1202, enforced, 417 F. 2d 533 .....3, 14

J.P. Stevens (Gulistan Division) (Stevens VII), 179 NLRB 254, enforced, 441 F. 2d 514, certiorari denied, 404 U.S. 830 3

J.P. Stevens (Gulistan Division) (Stevens XI), 186 NLRB 180, enforced, 455 F. 2d 607 3

J.P. Stevens (Stevens III), 167 NLRB 266, enforced with modifications, 406 F. 2d 1017 .....3, 14

J.P. Stevens (Stevens IV), 167 NLRB 258, enforced with modifications, 406 F. 2d 1017 .....3, 14

J.P. Stevens (Stevens VIII), 181 NLRB 666, enforcement granted in part and denied in part, 449 F. 2d 595 3

J.P. Stevens (Stevens IX), 183 NLRB 25, enforced, 461 F. 2d 490 3

J.P. Stevens (Stevens XII), 190 NLRB 751, remanded on other grounds, 475 F. 2d 973, on remand, 205 NLRB 1032 3

J.P. Stevens (Stevens XIV), 217 NLRB 513, enforced, 547 F. 2d 792 3-4

J.P. Stevens (Stevens XV), 219 NLRB 850, enforced, 547 F. 2d 792 4

J.P. Stevens (Stevens XVI), 220 NLRB 270 4

Page

Cases—(Continued):

Lawn v. United States, 355 U.S. 339 10

League of Vol. Hosp. & H. of N.Y. v. Local 1199, Drug and Hospital Union, 490 F. 2d 1398 15

McComb v. Jacksonville Paper Co., 336 U.S. 187 .....10, 13, 15

National Labor Relations Board v. Babcock & Wilcox Co., 351 U.S. 105 .....9, 10, 11

National Labor Relations Board v. Crown Laundry, 437 F. 2d 290 14

National Labor Relations Board v. Hickman Garment Company, 471 F. 2d 611 12

National Labor Relations Board v. J.P. Stevens (Stevens XIII), 464 F. 2d 1326, certiorari denied, 410 U.S. 926, remedial order reported at 81 LRRM 2285 .....3, 4, 5, 7, 8, 12

National Labor Relations Board v. J.P. Stevens (Stevens XVII), 538 F. 2d 1152 4

National Labor Relations Board v. J.P. Stevens (Stevens XVIII), 563 F. 2d 8 4

National Labor Relations Board v. Johnson Manufacturing Co. of Lubbock, 511 F. 2d 153 11

National Labor Relations Board v. Lynair, 380 F. 2d 286 12

National Labor Relations Board v. Ralph Printing & Lithographing Co., 433 F. 2d 1058, certiorari denied, 401 U.S. 925 12

Page

Cases—(Continued):

National Labor Relations Board v. *Schill Steel Products, Inc.*, 480 F. 2d 586 ..... 11, 12

National Labor Relations Board v. *Truck Drivers & Helpers Local 676*, 450 F. 2d 413 12

Neely v. *Eby Construction Co.*, 386 U.S. 317 10

Shillitani v. *United States*, 384 U.S. 364 13

Textile Workers of America v. *National Labor Relations Board (Stevens II)*, 388 F. 2d 896, certiorari denied *sub nom. J.P. Stevens & Co.* v. *National Labor Relations Board*, 393 U.S. 836 3

United States v. *Cohen Grocery Co.*, 255 U.S. 81 13

United States v. *Greyhound Corp.*, 370 F. Supp. 881, affirmed, 508 F. 2d 529 15

United States v. *National Dairy Corp.*, 372 U.S. 29 13

United States v. *New York Telephone Co.*, No. 76-835, decided December 7, 1977 10

United States v. *Powell*, 423 U.S. 87 13

United States v. *United Mine Workers*, 330 U.S. 258 ..... 14, 15

Universal Camera Corp. v. *National Labor Relations Board*, 340 U.S. 474 15

Page

Statutes and rule:

All Writs Act, 28 U.S.C. 1651(a) 10

National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) 2

Section 7 4

Section 8(a)(1) 3

Section 8(a)(3) 3

Section 8(a)(4) 3

Federal Rules of Civil Procedure, Rule 65(d) 12, 13

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-30a), adjudging petitioners in civil contempt of a previous contempt decree and two enforcement decrees of that court, is reported at 563 F. 2d 8. The opinion of the court of appeals in the earlier contempt proceeding is reported at 464 F. 2d 1326, certiorari denied, 410 U.S. 926. The opinions in the two enforcement cases are reported at 380 F. 2d 292, certiorari denied, 389 U.S. 1005, and 388 F. 2d 896, certiorari denied, 393 U.S. 836. The underlying Board decisions are reported at 157 NLRB 869 and 163 NLRB 217.

JURISDICTION

The judgment of the court of appeals (Pet. App. 31a-42a) was entered on October 19, 1977. The petition for a writ of certiorari was filed on November 21, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the provision of the court of appeals' decree granting access by union representatives to non-working areas of Company plants to meet with employees during their non-working time is appropriate in this civil contempt proceeding to remedy effects of the conduct found to be in contempt of the court's earlier decrees.

2. Whether the provisions of the court's decree are sufficiently descriptive to give petitioners adequate notice of required and proscribed conduct.

3. Whether the remedies provided in the court's decree are proportionate to the Company's violations of the earlier court decrees.

4. Whether clear and convincing evidence supports the court's findings that petitioners failed to comply with, and thus were in contempt of, the court's prior decrees.

STATUTE INVOLVED

Relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at Pet. 3.

STATEMENT

A. THE UNDERLYING DECREES AND THE FIRST CONTEMPT ADJUDICATION

In September 1967, and March 1968, the court of appeals issued decisions[1] sustaining the Board's findings that J.P. Stevens & Co., Inc. (the "Company") had committed "massive violations" of Section 8(a)(1), (3), and (4) of the National Labor Relations Act (Pet. App. 2a).[2] The court's decrees in those two cases[3] required the

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[1] *J.P. Stevens* v. *National Labor Relations Board (Stevens I)*, 380 F. 2d 292 (C.A. 2), certiorari denied, 389 U.S. 1005; *Textile Workers Union of America* v. *National Labor Relations Board (Stevens II)*, 388 F. 2d 896 (C.A. 2), certiorari denied *sub nom. J.P. Stevens & Co.* v. *National Labor Relations Board*, 393 U.S. 836.

[2] The unlawful conduct included the discharge of 71 employees because of union activities at 20 of the Company's 43 plants in North and South Carolina. 380 F. 2d at 295.

[3] The two cases were the first of eighteen unfair labor practice or contempt proceedings involving the Company to date. See *J.P. Stevens (Stevens III)*, 167 NLRB 266, enforced with modifications, 406 F. 2d 1017 (C.A. 4); *J.P. Stevens (Stevens IV)*, 167 NLRB 258, enforced with modifications, 406 F. 2d 1017 (C.A. 4); *J.P. Stevens (Dublin-Nathaniel Plants) (Stevens V)*, 171 NLRB 1202, enforced, 417 F. 2d 533 (C.A. 5); *The Black Hawk Corp. (Stevens VI)*, 177 NLRB 944, enforcement granted in part and denied in part, 431 F. 2d 900 (C.A. 4); *J.P. Stevens (Gulistan Division) (Stevens VII)*, 179 NLRB 254, enforced, 441 F. 2d 514 (C.A. 5), certiorari denied, 404 U.S. 830; *J.P. Stevens (Stevens VIII)*, 181 NLRB 666, enforcement granted in part and denied in part, 449 F. 2d 595 (C.A. 4); *J.P. Stevens (Stevens IX)*, 183 NLRB 25, enforced, 461 F. 2d 490 (C.A. 4); *The Black Hawk Corp. (Stevens X)*, 183 NLRB 267; *J.P. Stevens (Gulistan Division) (Stevens XI)*, 186 NLRB 180, enforced, 455 F. 2d 607 (C.A. 5); *J.P. Stevens (Stevens XII)*, 190 NLRB 751, remanded on other grounds, 475 F. 2d 973 (C.A. D.C.), on remand, 205 NLRB 1032; *National Labor Relations Board* v. *J.P. Stevens (Stevens XIII)*, 464 F. 2d 1326 (C.A. 2), certiorari denied, 410 U.S. 926 (on contempt), remedial order reported at 81 LRRM 2285; *J.P. Stevens*

Company, *inter alia*, to cease and desist from discharging or otherwise discriminating against its employees to discourage membership in the Textile Workers Union of America, AFL-CIO (the "Union") or any other labor organization; engaging in surveillance of union organizing activities, or instructing employees to report on the union activities of other employees; interrogating employees concerning union activities; threatening employees with discharge or other reprisals because of their union sympathies or activities; altering employees' working conditions for the purpose of defeating union organizational efforts; interrogating and intimidating employees concerning their statements to Board agents; encouraging or coercing employees to withdraw from the Union; and "in any other manner" interfering with, restraining, or coercing employees in the exercise of their rights protected by Section 7 of the Act. See *National Labor Relations Board* v. *J.P. Stevens (Stevens XIII)*, 464 F. 2d 1326, 1329-1330 (C.A. 2), certiorari denied, 410 U.S. 926.

In July 1972, the court of appeals found the Company to be in contempt of its two prior decrees, noting that the Company had engaged in a "pattern of flagrantly contemptuous conduct" including "* * * such unlawful tactics as engaging in surveillance of organizing activities, interrogating employees about their union inclinations, threatening pro-union employees with discharge and other reprisals, discriminatorily altering their work conditions and discharging them because of their union sympathies."

(Stevens XIV), 217 NLRB 513, enforced, 547 F. 2d 792 (C.A. 4); *J.P. Stevens (Stevens XV)*, 219 NLRB 850, enforced, 547 F. 2d 792 (C.A. 4); *J.P. Stevens (Stevens XVI)*, 220 NLRB 270; *National Labor Relations Board* v. *J.P. Stevens (Stevens XVII)*, 538 F. 2d 1152 (C.A. 5); *National Labor Relations Board* v. *J.P. Stevens (Stevens XVIII)*, 563 F. 2d 8 (C.A. 2) (on comtempt), (the present case).

Stevens XIII, *supra*, 464 F. 2d at 1328-1329. To remedy the Company's unlawful and contumacious conduct, the court not only entered a broad cease and desist order as in the earlier decrees, but also directed that the Union be granted access to employee bulletin boards in all Company plants in North and South Carolina, and access to the five plants where violations of the decrees occurred, in order to enable the Union to respond to Company speeches to the employees concerning union representation and to address the employees prior to any scheduled Board election. The court also required the Company to provide the Union with a list of the names and addresses of employees at the five plants, to post a notice and copy of the court's adjudication in all of the Company's plants in North and South Carolina, to mail a copy of the notice to all of its employees in North and South Carolina, and to permit a Board agent to read the notice to the employees at the five plants.[4]

B. THE SECOND CONTEMPT PROCEEDING

In September 1973, the Board petitioned the court of appeals for an order adjudging the Company and certain of its supervisory personnel in contempt of the above decrees. The court appointed Monrad G. Paulsen, then Dean of the University of Virginia Law School, as Special Master to hear the evidence and make determinations of fact and law on the issues raised (Pet. App. 3a). Extensive hearings involving numerous witnesses were held, resulting in nearly 1400 pages of transcript and voluminous exhibits. The Special Master issued his report on September 28, 1976, finding that the Company and some 23 of its supervisors had violated the court's prior decrees (Pet. App. 4a, 43a-90a).

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[4]The court's remedial order was issued on September 13, 1972, and is reported at 81 LRRM 2285.

The court of appeals adopted the master's report as to the violations found and held that the Company and the 23 supervisors were in civil contempt of the court's prior decrees (Pet. App. 19a-20a, 30a). The conduct found to be contumacious may be summarized as follows:

At its plant in Turnersburg, North Carolina, the Company and its supervisors Mack Reneger, Max Shaver, Allen Shew, Junior Anderson, and Ed Mitchum carried out a campaign of interference with the statutorily protected solicitation and distribution activities of seven employees on the eve and day of a Board election at the plant (Pet. App. 6a-8a, 44a-50a).

In Wallace, South Carolina, the Company, through Personnel Director Harold Guerry and Safety Inspector Larry Burroughs, placed an electronic eavesdropping device in the motel room of a union organizer and monitored the meetings between organizers and Company employees during the Union's organizing campaign at two of the Company's Wallace plants (Pet. App. 13a-15a, 60a-67a). Supervisor Chester Martin discharged employee Moses Covington for engaging in union activities (Pet. App. 10a-11a, 52a-54a). Supervisors Ernest Meadows and Howard Sellers discriminatorily reprimanded employee Jimmy Grooms (Pet. App. 50a-52a). Personnel Director John Thomas interfered with statutorily protected leafletting activities of two employees and threatened them with discharge (Pet. App. 54a-56a). Supervisor Troy Quick coercively interrogated employee John Hunter and asked him to report to the Company on other employees' union activities (Pet. App. 11a-13a, 59a-60a).

At three of its plants in Roanoke Rapids, North Carolina, the Company coercively polled all of its employees to determine if they thought a union would "help" or "hurt" them. The polling, conducted by means

of a survey, constituted surveillance of union activities because the Company was able to identify the percentage of pro-union employees within each department and shift (Pet. App. 16a, 81a-82a). The Company later posted a notice in the three plants misrepresenting the results of the poll and leading employees to believe that support for union representation was substantially less than the survey results actually indicated (Pet. App. 16a, 82a-83a). Through its supervisors Ray Mabry, Eugene Taylor, James Alston, Dave Moody, Mason Lee, and Tommy Gardner,[5] the Company harassed, reprimanded, interrogated, and threatened an in-plant union organizer, employee Crystal Lee Jordan, and ultimately discharged her for union activities (Pet. App. 16a-19a, 69a-75a). Supervisor Mabry also discriminatorily reprimanded and suspended employee Cheryl Ann Wasmund and interfered with the statutorily protected leafletting activities of another employee (Pet. App. 67a-69a, 77a-79a). Supervisor Jimmy Martin likewise interfered with an employee's leafletting (Pet. App. 80a-81a). Supervisor Vernon Payne coercively interrogated employee Linda Williams, and supervisor Robert "Pete" Rawlings coercively questioned employee Sadie Lewis (Pet. App. 16a, 75a-77a). Supervisors William Hinton and Raymond Thompson made employee Joseph Williams' work assignments more difficult and ultimately suspended and then discharged Williams because of his pro-union activities (Pet. App. 16a, 83a-86a).

Based on the above unlawful conduct, the court of appeals concluded that "* * * there is the strong possibility that respondents 'deliberately took their

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[5]Supervisors Mason Lee and Tommy Gardner, as well as supervisor Robert "Pete" Rawlings (*infra*), were adjudicated in contempt in *Stevens XIII, supra*.

chances in ignoring our decrees because they thought it profitable for them to do so' " (Pet. App. 21a, quoting *Stevens XIII, supra,* 464 F. 2d at 1329). Adding that its experience with the Company "* * * raises grave doubts about the ability of the courts to make the provisions of the federal labor law work in the face of persistent violations" (Pet. App. 29a), the court issued an order patterned after its order in the first contempt proceeding, but expanded to remedy the effects of the Company's persistent contumacy and to provide prospective coercive measures to assure future compliance with the court's decrees (Pet. App. 31a-38a).

Thus, the court's order, as in *Stevens XIII,* contains broad cease-and-desist provisions; grants union access to Company bulletin boards; permits the Union to respond to Company speeches concerning union representation and to address employees prior to any Board election; requires the Company to give the Union lists of its employees' names and addresses, to post and mail notices of the court's adjudication, and to permit the court's notice to be read to its employees (Pet. App. 32a-36a). Moreover, the court determined that these remedies should be applied to all of the Company's plants in North and South Carolina (Pet. App. 22a-23a, 26a-27a).[6]

In addition, the court ordered the Company at all of its Carolina plants: (1) to establish a program for educating its supervisors "* * * in the area of the rights of union organizers and plant employees who wish to organize or who wish to join a union" (Pet. App. 34a); (2) to publish written non-discriminatory rules governing solicitation

[6]In *Stevens XIII,* certain of the remedies were limited to the five plants where violations had occurred (*supra,* p. 5).

and distribution of literature upon its property (Pet. App. 35a); and (3) to grant union organizers access to non-work areas "for the purpose of communicating orally and in writing with the employees" during non-working time (Pet. App. 36a).

Finally, the court imposed a prospective compliance fine against the Company in the amounts of $100,000 for each future violation of the court's decrees and $5,000 per day for each continuing violation. Prospective fines of $1,000 for each violation and $100 daily for each continued violation were established as to the individual contemnors. (Pet. App. 37a.)

ARGUMENT

1. Relying on this Court's decision in *National Labor Relations Board* v. *Babcock & Wilcox Co.,* 351 U.S. 105, which reversed a Board finding of an unfair labor practice by an employer, petitioners assert that the court of appeals lacked power to order the Company to grant the Union access to non-working areas in the Company's plants[7] absent evidence that "there are no alternative channels of communication reasonably available to the union" (Pet. 6). Petitioners are foreclosed from raising

[7]The specific provision of the court's order reads as follows:

> 15. For the two year period, upon request of the Union, the Company shall without delay, permit a reasonable number of Union representatives access for reasonable periods of time to all its canteens, rest and other non-work areas, including parking lots, within each of its plants in North and South Carolina, for the purpose of communicating orally and in writing with the employees in such areas during changes of shift, breaks, mealtime or other non-work periods. The Company shall formulate rules on this subject in the same manner as provided in paragraph 10. [Pet. App. 36a.]

this contention here, since they failed to raise it in the court of appeals.[8] See *Lawn* v. *United States*, 355 U.S. 339, 362 n. 16; *Neely* v. *Eby Construction Co.*, 386 U.S. 317, 330.

In any event, there is no merit to the contention. It fails to recognize that the court's order rests, not upon what is required to establish an unfair labor practice under the National Labor Relations Act, but upon "the power of a court to grant the relief that is necessary to effect compliance with its decree." *McComb* v. *Jacksonville Paper Co.*, 336 U.S. 187, 193. A court has power, both inherently and by virtue of the All Writs Act, 28 U.S.C. 1651(a) (see *United States* v. *New York Telephone Co.*, No. 76-835, decided December 7, 1977, slip op. 12-14), to take whatever action is reasonably necessary to insure that its decree is obeyed. "The measure of the court's power in civil contempt proceedings is determined by the requirements of full remedial relief." *McComb, supra*, 336 U.S. at 193.[9] Moreover, access remedies similar to those

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[8]Petitioners failed to challenge the access remedy on this ground although they had three opportunities—in their opening and reply briefs and in their post-decisional counter-proposal regarding the terms of the court's order—to do so after the remedy was proposed by the Board in its exceptions to the Master's report and in its opening brief to the court. (See Pet. App. 21a-22a and n. 21.)

[9]Nothing in *National Labor Relations Board* v. *Babcock & Wilcox Co., supra*, or the other cases relied upon by the petitioners (Pet. 6-10) suggests that these remedies are improper in the circumstances here. *Babcock & Wilcox Co.* held only that an employer, who had not otherwise violated the National Labor Relations Act, could not be held to have committed an unfair labor practice merely by denying union organizers access to company property where the organizers had reasonable alternative means of communicating with employees. 351 U.S. at 112-114. The accommodation between organizational rights under the Act and employer property rights

provided by the court of appeals here have been provided in other contempt proceedings where employers have created coercive atmospheres within their plants. See, *e.g.*, *National Labor Relations Board* v. *Johnson Manufacturing Co. of Lubbock*, 511 F. 2d 153, 157-158 (C.A. 5); *National Labor Relations Board* v. *Schill Steel Products, Inc.*, 480 F. 2d 586, 599 (C.A. 5).

The access remedy provided by the court of appeals is a reasonable means of dissipating the effects of the Company's continued contumacy, and of insuring future compliance with its decrees. As the court of appeals stated in concluding that the Union should be allowed access to certain non-work areas of the Company's Carolina plants:

> It is apparent from this contempt adjudication that the in-plant organizing activities of Stevens's employees have been frustrated and discriminated against by the Company's policies. We recognize that "[t]he policies of the [National Labor Relations] Act," in the context of a union organizing campaign, do not necessarily call for increased union access to the employees, but "call instead for a change in the plant's atmosphere." [*Stevens II, supra*, 388 F. 2d at

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struck in *Babcock & Wilcox* does not apply where, as here, an employer has repeatedly frustrated employee organizational activity and a remedy must be fashioned for such unlawful conduct.

The propriety of the access remedy here is not impaired by petitioners' speculative fear (Pet. 9) that it would deprive an employer of the right "to manage its operations in an efficient and peaceful fashion." The court's decree permits the company to formulate rules regulating access (note 7, *supra*). If these rules are reasonable, it cannot be assumed that the Union will violate them, and, in the unlikely event that it does, the Company could then petition the court for an appropriate modification of its order.

906.] But in this case, we believe that the two goals are complementary. Reasonable solicitations for the union should be permitted without the employees' fear that they will be reprimanded or placed under surveillance by their supervisors. Giving the union access to some non-work areas of the plants will help to reduce this atmosphere of fear, and is therefore an appropriate remedy to order in this case. [Pet. App. 27a-28a.]

2. There is also no merit in petitioners' contention (Pet. 10-14) that the court's order is impermissibly vague because it qualified some of its directives with the term "reasonable"—for example, that the Company provide the Union "reasonable" notice and "reasonable" access to the Company property. There is no basis for contending that those directives are "so vague that men of common intelligence must necessarily guess at [their] meaning" (*Connally* v. *General Construction Co.*, 269 U.S. 385, 391); and the use of the qualifying term "reasonable", if anything, should afford the Company greater latitude in the good faith management of its affairs. Far from being repugnant to Rule 65(d) of the Federal Rules of Civil Procedure, the term "reasonable" is found in numerous court orders under the National Labor Relations Act;[10]

[10]See, *e.g.*, *National Labor Relations Board* v. *Truck Drivers & Helpers Local 676*, 450 F. 2d 413, 415 (C.A. 3); *National Labor Relations Board* v. *Schill Steel Products, Inc.*, *supra*, 480 F. 2d at 599; *National Labor Relations Board* v. *Hickman Garment Company*, 471 F. 2d 611, 612 (C.A. 6); *National Labor Relations Board* v. *Lynair*, 380 F. 2d 286, 288 (C.A. 6); *National Labor Relations Board* v. *Ralph Printing & Lithographing Co.*, 433 F. 2d 1058, 1064 (C.A. 8), certiorari denied, 401 U.S. 925; *Stevens XIII*, *supra*, 81 LRRM at 2286. These decisions also offer ample precedent

indeed, Rule 65(d) itself uses the term "reasonable detail" as the descriptive standard for delineating acts to be restrained by court injunctions.[11]

3. Contrary to petitioners' contention (Pet. 15-17), the remedies ordered by the court of appeals are neither too broad nor too severe.[12] Faced with the "flouting of [its] orders not once, but twice" (Pet. App. 30a), and having found that " 'there is every reason to anticipate that if not deterred, [the Company] would pursue the same discriminatory policies throughout the region' " (*id.* at 22a), the court properly applied the remedies to all of the Company's plants in North and South Carolina, and imposed, in addition to the remedies previously imposed

for the use of the term "continuing violation," to which petitioners object (Pet. 11), in describing violations subject to prospective daily compliance fines.

In both *Cline* v. *Frink Dairy Co.*, 274 U.S. 445, 454, and *United States* v. *Cohen Grocery Co.*, 255 U.S. 81, 89, relied on by petitioners (Pet. 14), legislative enactments were struck down not simply because they contained the word "reasonable," but because they left open the "widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against." See *United States* v. *Powell*, 423 U.S. 87; *United States* v. *National Dairy Corp.*, 372 U.S. 29, 35-36. Here, on the contrary, the reasonableness of petitioners' conduct and the continuing nature of the violations can be measured objectively.

[11]Moreover, in light of the Company's repeated contumacy, the court properly declined to impose a more specific blueprint for Company conduct. "Decrees of that generality are often necessary to prevent further violations where a proclivity for unlawful conduct has been shown." *McComb* v. *Jacksonville Paper Co.*, *supra*, 336 U.S. at 192.

[12]Since the remedies were intended to be, and are, remedial rather than punitive, petitioners are in error (Pet. 15, 18-19) in equating these proceedings with criminal contempt proceedings. See *Shillitani* v. *United States*, 384 U.S. 364.

(and violated), the access remedy discussed previously (pp. 9-12) and the prospective compliance fines discussed below.[13]

The amounts of the prospective compliance fines imposed by the court meet the criteria laid down in *United States* v. *United Mine Workers*, 330 U.S. 258, 304-305. The "harm threatened by continued contumacy" (*id.* at 304) is substantial due to the failure of prior court orders to halt the unlawful conduct "* * * that has earned the Company its reputation as the 'most notorious recidivist' in the field of labor law" (Pet. App. 3a). Substantial prospective fines are therefore necessary to insure "the probable effectiveness [of the court's decree] in bringing about the result desired" (330 U.S. at 304), particularly in view of the court's determination that petitioners "* * * deliberately took their chances in ignoring our decrees because they thought it profitable for them to do so" (Pet. App. 21a). Moreover, in removing the profit incentive for the Company's unlawful conduct, the court properly recognized that "the amount of [the Company's] financial resources" (330 U.S. at 304) is substantial. Given the Company's net worth of more than

[13]The furnishing of employee lists to the Union (Pet. App. 27a, 36a) was ordered not only in the earlier contempt proceeding (81 LRRM 2285), but also in unfair labor practice cases against the Company in other circuits: *J.P. Stevens* v. *National Labor Relations Board, supra*, 406 F. 2d at 1022-1024 (C.A. 4); *J.P. Stevens* v. *National Labor Relations Board, supra*, 417 F. 2d at 540 (C.A. 5). Similarly, the opportunity given the Union both to make pre-election speeches and to rebut Company speeches concerning union representation was afforded in the earlier contempt proceeding. 81 LRRM 2285. See also *National Labor Relations Board* v. *Crown Laundry*, 437 F. 2d 290, 294 (C.A. 5).

$450,000,000 and its fiscal 1976 profits of more than $41,000,000, the fines imposed on the Company for future violations of the court's decree are not excessive.[14]

4. Petitioners' contention (Pet. 17-19) that the court of appeals' findings of contempt are not based on clear and convincing proof depends on an evaluation of the facts of this particular case, and does not warrant review by this Court. See *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 490-491. Moreover, the Special Master's report (Pet. App. 43a-90a), which was adopted by the court (Pet. App. 19a-20a), shows that the findings of contempt are based on clear and convincing evidence. The court properly rejected (Pet. App. 9a-10a) petitioners' contention (Pet. 18-19) that it was necessary for the Board to demonstrate that the violations of the court's decrees were committed wilfully. It is well established that "[t]he absence of wilfulness does not relieve from civil contempt." *McComb* v. *Jacksonville Paper Co., supra*, 336 U.S. at 191.

[14]Compliance fines of similar size have been imposed in other civil contempt cases involving large corporate or union contemnors. *United States* v. *United Mine Workers, supra* ($2,800,000); *United States* v. *Greyhound Corp.*, 370 F. Supp. 881, 885 (N.D. Ill.), affirmed, 508 F. 2d 529, 541 (C.A. 7) ($600,000); *League of Vol. Hosp. & H. of N.Y.* v. *Local 1199, Drug and Hospital Union*, 490 F. 2d 1398, 1404 (T.E.C.A.) ($500,000); *International Business Machines Corp.* v. *United States*, 493 F. 2d 112, 116-117 (C.A. 2), certiorari denied, 416 U.S. 995 (daily fine of $150,000).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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